

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Modernizing the E-rate) WC Docket No. 13-184
Program for Schools and Libraries)

To: The Commission

COMMENTS OF BLACKBOARD ENGAGE

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EXECUTIVE SUMMARY

Blackboard Engage has been actively involved in E-rate proceedings before the Commission for years, vigorously defending funding for web hosting. As the Commission has acknowledged, web hosting makes a “substantial educational impact for a relatively small cost.” In view of the costs and benefits, Blackboard Engage and many other stakeholders have asserted that E-rate eligibility for web hosting should be kept.

However, if the Commission determines in this proceeding that it must eliminate funding for web hosting in order to maximize funding for robust broadband connections to our K-12 schools, then Blackboard Engage proposes that the Commission discontinue funding in 2015 (or the funding year that is one year after such a decision is made), and not engage in a gradual phase-out of eligibility. A gradual phase-out would create the worst possible result for schools and service providers – schools would have less money with which to purchase web hosting while service providers would continue to be restricted in their ability to offer creative pricing options and free services that maximize value.

Conversely, if eligibility for web hosting is not eliminated as a result of this proceeding, then Blackboard Engage urges the Commission to take the following actions in order to improve cost-effectiveness, improve transparency, and improve administration of the program:

- (1) make every aspect of the E-rate application process – as well as related documents – available to the public online, including RFPs, responses, contracts, pricing, discount information, eligibility determinations, cost allocation details, etc;
- (2) change the Form 474 review process to allow service providers to communicate directly with USAC staff through a “notice and cure” process;
- (3) prohibit web hosting companies from bundling eligible and ineligible features for one combined price;
- (4) eliminate cost allocation procedures for web hosting which serve as a *de facto* and opaque pricing mechanism;
- (5) abolish application of the “ancillary” rule for web hosting services;

- (6) adopt alternate benefit allocation methods that can be used when bundling is offered;
- (7) allow E-rate applicants to receive free goods and services that are available in the marketplace on a widespread basis;
- (8) establish a voluntary E-rate pre-certification program to determine eligibility for E-rate products and services;
- (9) tie release and use of the of the Form 470 for a funding year with release of the finalized ESL for that year in order to eliminate uncertainty and mitigate against vendors gaming the system;
- (10) clarify application of the “lowest corresponding price” rule;
- (11) encourage electronic filings and digital signatures;
- (12) make it easier to enter into multi-year arrangements;
- (13) refrain from increasing reporting requirements; and
- (14) refrain from requiring document retention for 10 years.

To the extent eligibility for web hosting is preserved, Blackboard Engage believes that these improvements will benefit all stakeholders and will result in more cost-efficient use of E-rate funds.

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Edline, LLC d/b/a Blackboard Engage (“Blackboard Engage”) hereby files these comments in response to the E-rate Modernization Notice of Proposed Rulemaking (“NPRM”) in the above-captioned docket.¹ Blackboard Engage and its affiliates² provide web hosting services to approximately 20,000 schools throughout the country, some of which participate in the E-rate program. Blackboard Inc.,³ the parent company⁴ of Blackboard Engage, is a global leader in enterprise technology and innovative solutions that improve the educational experience of millions of families, students and learners around the world every day.

Blackboard Engage has been actively involved in E-rate proceedings before the Commission for years, defending eligibility for, and funding for, web hosting.⁵ E-rate eligible web hosting

¹ *Modernizing the E-rate Program for Schools and Libraries*, Notice of Proposed Rulemaking, WC Docket No. 13-184, FCC 13-100 (rel. July 23, 2013)(“NPRM”).

² Other affiliated web hosting companies include SchoolWorld, SchoolCenter, SchoolFusion, and TeacherWeb.

³ Founded in 1997, Blackboard Inc. is headquartered in Washington, D.C., with offices in North America, Europe, Asia and Australia.

⁴ Edline, LLC merged with Blackboard Inc. in October 2011.

⁵ In 2010 the Commission reached tentative conclusions in the Further Notice of Proposed Rulemaking (“FNPRM”) released with the *FY2010 ESL Report and Order* that web hosting either should not be eligible for funding under the E-rate program, or, alternatively, should only be eligible for E-rate program funds as a Priority 2 service. Blackboard Engage commented extensively on the value of web hosting in response to the FNPRM. *See* Comments of Edline and ePals to the *E-Rate Further Notice of Proposed Rulemaking and the National Broadband Plan E-Rate Notice of Proposed Rulemaking*,

services provide an essential means for students, teachers, parents and administrators to share important information, as a community, about the entire educational experience. Web hosting also is used as a gateway for modern educational technology and digital learning tools. Even the Commission has acknowledged the “substantial educational impact” that web hosting can make “for a relatively small cost.”⁶ In view of the benefits and the marginal costs to the E-rate program, Blackboard Engage and many other stakeholders have asserted that E-rate eligibility for web hosting should be kept.

If the Commission determines in this proceeding that it must eliminate funding for web hosting in order to maximize funding for robust broadband connections to our K-12 schools, then Blackboard Engage proposes that the Commission should discontinue funding in 2015 (or the funding year that is one year after such a decision is made), and not engage in a gradual phase-out of eligibility which would present the worst alternative for both schools and service providers for the reasons described herein.

Conversely, if eligibility for web hosting is not eliminated as a result of this proceeding, then Blackboard Engage urges the Commission to make several improvements to the program that are needed, at least for web hosting services, in order to improve cost-effectiveness, improve transparency of pricing and eligibility determinations (which will ensure rule compliance and level

CC Docket No. 02-6, GN Docket No. 09-51 (filed on July 9, 2010). During that proceeding, hundreds of schools weighed in about the importance of continuing the availability of web hosting for purposes of meeting educational requirements and budgets. A number of educators also commented that in economically difficult times, school districts must maximize diminishing funds, and web hosted communications services offer superior functionality and cost savings. *See* Reply Comments of Edline and ePals to the *E-Rate Further Notice Of Proposed Rulemaking and the National Broadband Plan E-Rate Notice of Proposed Rulemaking*, CC Docket No. 02-6, GN Docket No. 09-51, at 8 and Appendix A (dated July 26, 2010) (“Edline and ePals 2010 Reply Comments”). In the interest of brevity we are not re-stating these arguments. We believe the importance of web hosting to achieving improved educational outcomes is well documented, widely accepted, and not credibly in dispute.

⁶ *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Sixth Report and Order, 25 FCC Rcd 18762, 18806, ¶ 100 (“Sixth Report and Order”).

the competitive playing field), and improve administration of the program. The program, as it exists today, does not work well for stakeholders that have interest in web hosting.

I. BACKGROUND ON BLACKBOARD ENGAGE.

While Blackboard Inc. is traditionally seen as a higher education solutions provider, we actually have more clients in the K-12 space. More than half of the U.S. school districts and 75 percent of statewide virtual schools are currently using our products, and we are the leading provider of school websites and parent engagement notification tools. Additionally, one in three U.S. families uses Blackboard products.

Our large footprint gives us a unique vantage point to understand the needs and issues of the K-12 community and successfully offer them comprehensive solutions. Our market strategy is driven by the “Active Learner,” or students who have grown up with the Internet and expect to have information readily available at their fingertips. At Blackboard, we are dedicated to helping districts: (1) manage the rising technology expectations among Active Learners and their parents; (2) implement a corresponding infrastructure; and (3) provide the appropriate training to help faculty feel comfortable teaching in a digital era.

As a subsidiary of Blackboard Inc., and as the leading provider of web hosting solutions, Blackboard Engage is well-positioned to comment on many of the issues raised in the NPRM from a vendor’s perspective, and how they may impact K-12 schools. Blackboard Engage is not just a technology vendor, it actively partners with its K-12 schools to provide educational technologies that are useful and valuable to advancing educational objectives.

II. COST-EFFECTIVENESS AND STREAMLINED ADMINISTRATION CAN BE ACHIEVED IN E-RATE FUNDED WEB HOSTING.

Although highly valuable to the K-12 educational mission, E-rate-funded web hosting has room for improvement to make it both more cost-effective and easier to administer. Blackboard Engage offers the following proposals which we believe, taken together, provide sound solutions to

help achieve the Commission's stated objectives of increasing cost-effectiveness and streamlining administration in the E-rate program:⁷

A. The Commission Should Make Every Aspect of the E-Rate Program as Transparent as Possible; There Is No Such Thing as Too Much Transparency.

A recurrent question in the NPRM is whether more transparency would be beneficial. Our answer: there is simply no such thing as too much transparency. Blackboard Engage believes that the value of transparency cannot be understated, and supports making every aspect of the E-rate process – as well as the related documents⁸ – available to the public online.⁹

1. Current Transparency Rules Benefit Only Those Who Can Afford To Take Advantage of Them.

Many aspects of the E-Rate procurement process are subject to transparency requirements today. Indeed, most state and federal procurement rubrics require transparency. Either through the federal Freedom of Information Act (“FOIA”), or the often-found state equivalent, public institution procurement is meant to be transparent. What is more, the Commission's rules require vendors to make their records available for on-site public inspection. As the NPRM notes, “section 54.501(c)(3) of our rules requires service providers to ‘keep and retain records of rates charged to

⁷ Blackboard Engage supports the calls of the School Superintendents Association and the Association of Educational Service Agencies for increased E-rate funding. *See* Comments of AASA: The School Superintendents Association and the Association of Educational Service Agencies, *In the Matter of Modernizing the E-Rate Program for Schools and Libraries*, WC Docket No. 13-184 (filed August 27, 2013). In the interest of brevity, and because those arguments are so artfully articulated by other respondents, Blackboard Engage has elected not to duplicate those arguments herein.

⁸ Later in our comments, Blackboard Engage calls for the elimination of the current cost-allocation process with respect to web hosting. *See infra* at Sec. II.B. If it is retained, however, all cost-allocation filings with USAC should be publicly available online as well.

⁹ Even though enabling online access to all E-rate filings may require USAC to upgrade its internal technology systems, we believe that the resulting benefits far outweigh any initial upfront costs.

and discounts allowed for eligible schools and libraries on their own or as part of a consortium. Such records shall be available for public inspection.”¹⁰

The underlying policy goal of these laws and regulations, and their combined legal effect, is some level of transparency. Unfortunately the FOIA process is often cumbersome, slow, and dependent upon a working knowledge of the underlying required disclosure framework. On-site inspection is cost-prohibitive for some, and labor intensive for all. These impediments to disclosure are inconsistent with the underlying policy objective of transparency. If the Commission would require online disclosure of applicant and vendor E-Rate filings, it would remove these impediments, increasing the flow of information, furthering competition, helping create a level playing field between vendors, and helping schools and libraries ensure they are getting desired products and pricing.¹¹

2. Transparency Is Important To Foster Competition.

The importance of increased transparency is not unique to the E-rate program. The National Broadband Plan (“NBP”), which contains the basic principles of the U.S. international telecommunications agenda, includes support for regulatory frameworks that are transparent, pro-

¹⁰ NPRM, ¶ 197.

¹¹ The Commission has moved to require online access to public files in other contexts in its ongoing effort to promote transparency, increase the availability of public records, and transition paper processes to digital technology. In 2012, the Commission updated its rules to require broadcasters to post their public inspection files online to make them more accessible, despite vocal objections from stakeholders that such a requirement would result in commercial harm. In making this decision, the Commission noted that “[m]aking the information available online will permit 24-hour access from any location, without requiring a visit to the station, thereby greatly increasing public access to information ... The public benefits of posting this information online, while difficult to quantify with exactitude, are unquestionably substantial.” See *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations, Extension of the Filing Requirement For Children’s Television Programming Report (FCC Form 398)*, Second Report And Order, MM Docket Nos. 00-168 and 00-44, 27 FCC Rcd 4535, ¶ 13 (2012).

competitive and technology-neutral.¹² Specifically, the NBP recommends that the Commission improve Universal Service Fund (“USF”) performance and accountability, while noting the Commission’s “overall effort to make the FCC more open and transparent.”¹³ To this end, the NBP recognizes the positive impact that transparency has on competition. Specifically, the NBP recommends that in order to foster broadband competition, disclosure requirements should be developed for providers “to ensure consumers have the pricing and performance information they need to choose the best broadband offers in the market.”¹⁴ The Commission emphasizes in the NBP that “[i]ncreased transparency will incent service providers to compete for customers on the basis of actual performance.”¹⁵

In keeping with these goals, when making recent reforms to the USF programs, the Commission consistently recognized the importance of transparency. For example, in the *USF/ICC Transformation Order*, the Commission adopted an approach for determining whether the overall burden of universal service contribution costs is increasing or decreasing for the typical American household using a straightforward calculation based on publicly available data. The Commission specifically noted that the benefit of the approach is that it is “transparent and easily verifiable.”¹⁶ In addition, the Commission adopted reverse auctions for Mobility Fund awards in the *USF/ICC Transformation Order* because, according to the Commission, it was the best available tool to identify areas where additional investment would make the biggest impact in a “transparent, simple, speedy,

¹² Federal Communications Commission, *Connecting America: The National Broadband Plan*, GN Docket No. 09-51, 60 (2010).

¹³ *See id.* at 143.

¹⁴ *See id.* at XI-XII.

¹⁵ *See id.* at XII.

¹⁶ *See Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 10-90 *et al.*, FCC 11-161, ¶ 58 (rel. Nov. 18, 2011) (“USF/ICC Transformation Order and FNPRM”).

and effective way.”¹⁷ There is no valid reason why E-rate RFPs, responses and contracts, together with details about all relevant pricing and discounts, cost-allocation details and eligibility determinations, should not be publicly available online. All stakeholders – schools, service providers, USAC, the FCC and the E-rate program – would benefit from this level of transparency and accountability.

3. Vendor Objections To Transparency Should Be Viewed With Skepticism.

We realize that some vendors assert “confidentiality” in an effort to stymie full disclosure. Blackboard Engage urges the Commission to view these arguments with due skepticism. Vendors who regularly respond to RFPs and solicitations assume – or should assume – that every aspect of a submitted proposal or RFP response is already subject to public disclosure under FOIA and related state laws.

Limited confidentiality privileges should be retained for trade secrets and other recognized intellectual property rights not otherwise protectable. However, any broader vendor confidentiality rights may be subject to abuse. For example, in a recent competitive solicitation¹⁸ in which Blackboard Engage was unsuccessful, the successful bidder requested that the customer disclose all of the submitted bid proposals. Blackboard Engage agreed to the request. When Blackboard Engage made a similar request, however, the successful bidder objected to the disclosure of its proposal.

The successful bidder asserted that its professional certifications, its implementation timeline, the consulting services it agreed to provide under the related agreement, and the detailed pricing itemization of its products are confidential and not subject to public disclosure. Those items speak to the very nature of the vendor’s offer and its ability to implement the selected solution.

¹⁷ *See id.*, ¶ 322.

¹⁸ The parties’ identities are anonymous for our purposes herein.

Transparency is especially important in the case of the successful bidder's response. Although the successful bidder's confidentiality arguments ultimately were rejected, the customer spent valuable time and resources evaluating the objections and seeking feedback from other respondents.

Blackboard Engage urges the Commission to adopt broad, clear transparency requirements.

4. To Make the Form 474 Review Process More Transparent and Efficient, Vendors Should Be Permitted To Communicate Directly To USAC Staff to Resolve Any Issues Through a Streamlined "Notice and Cure" Process.

Increased transparency includes, in part, the increased flow of information. Currently, however, the Form 474 (SPI) payment review process can change from year-to-year, sometimes without notice and in a seemingly arbitrary manner. Furthermore, there is no clear, efficient path for vendors to obtain clarifications when a Form 474 review yields an unexpected result. In order to increase transparency and efficiency surrounding the Form 474 review process, vendors should be permitted to speak directly to USAC staff to resolve any issues in an expeditious manner through a "notice and cure" process.

For example, in prior years, Form 474s submitted by Blackboard Engage have covered one year's service (July through June). Payment in full followed after we provided copies of requested invoices. This year new language was added to the reviewers' requests: "If the invoice is for deposits or up-front charges for services, please include a copy of the full contract that supports those charges." In one particular example, a Form 474 filing was rejected even though we submitted our standard contract. USAC's only explanation came with the SPI remittance notification, which stated: "Upfront Payment not approved for this FRN."

In response to our follow-up request, USAC said only: "We [USAC] received the copy of the contract; however, the contract did not have a clause allowing for up-front payments for this FRN. That is why the invoice was rejected. Since this is a one-time charge, you will need to wait until all services have been received before you can invoice again." Our contractual terms in regard to fee

payments have not changed year over year, however, and continue to state: “In consideration for Edline’s performance under the Contract, Customer agrees to pay Edline all fees required by the Purchasing Document, as applicable, which fees will be due in accordance with the provisions of the Purchasing Document, but in no event later than thirty (30) days after the date of an invoice from Edline.” In light of our contract language, USAC’s response is seemingly nonsensical. Yet we have no further means of clarifying the matter absent going through a re-submittal process, which is a monumental waste of time and resources.

We urge the Commission to require a Form 474 review process similar to USAC’s policy in connection with Program Integrity Assurance (“PIA”). Today, for example, during PIA review, the reviewer sends a letter to the applicant identifying ineligible findings. The letter asks if the applicant agrees and, if not, provides a means for the applicant to provide additional clarifying documentation and explanations prior to the issuance of the Funding Commitment Decision Letter.

A similar notice and cure period should be implemented for the Form 474 process. If a USAC invoice auditor denies disbursement of committed funds during review (after the filing of the Form 474), that auditor should send notice directly to the applicable service provider and permit the service provider to correct – if possible – the auditor’s objection. This direct communication between auditor and service provider would substantially increase the efficiency of auditor review, and decrease the number of needless re-submittals.

B. The Commission Should Require Pricing For Eligible Services To Be Clear and Distinct From Ineligible Services and Eliminate the Cost-Allocation Eligibility Process and the Ancillary Rule for Web Hosting Services.

In addition to increasing transparency through documentation disclosure and availability, Blackboard Engage proposes that the Commission should: (i) no longer allow web hosting providers

to bundle ineligible features with eligible web hosting for one combined price,¹⁹ (ii) eliminate the cost allocation procedure for web hosting, and (iii) abolish application of the “ancillary” rule for web hosting services. Adopting these changes will add clarity and additional transparency to web hosting pricing, eliminate the need for subjective and opaque cost allocations, preserve USAC resources, and help ensure that E-rate dollars for web hosting are only spent on eligible services. The result will be a level playing field in which vendor pricing is transparent and enforcement of E-rate eligibility for web hosting can be better policed by USAC and the industry.

1. Vendor Eligibility Determinations Are Too Subjective.

Web hosting vendors are not making eligibility determinations in the same manner. The State E-rate Coordinators Association (“SECA”) asserts that “there are a plethora of offerings from web hosting companies that include additional, ineligible functionality.”²⁰ SECA suggests that this may occur because some web hosting companies include ineligible functionality in their web hosting packages under the rule that allows inclusion of “ancillary” ineligible features with eligible features when costs cannot be separately determined.²¹ SECA may be right, the problem may emanate from differing interpretations of the “ancillary” rule. The root cause, however, is unclear. It may be that vendors have varying interpretations of eligibility, or it may be that the current cost allocation process, **which is not transparent**, allows for gamesmanship in pricing, leading to inequities.

¹⁹ Bundling of services for increased customer savings should be encouraged. But eligible features should be priced separately from ineligible features.

²⁰ See Reply Comments of State E-rate Coordinators Alliance, CC Docket No. 02-6, at 5 (filed June 7, 2013).

²¹ See *id.* The FCC rule for “ancillary” indicates that an otherwise eligible product or service that contains ineligible components on an “ancillary” basis does not require cost allocation if the cost of the ineligible functionality cannot be separately determined and if the product or service is the most cost-effective means of receiving the eligible product or service without regard to the value of the ineligible functionality. See 47 C.F.R. §54.504(g)(2). While the “ancillary” rule makes sense in theory, in practice this rule has unintentionally created a loophole that some web hosting providers are exploiting by improperly bundling ineligible features into their core web hosting offering to avoid cost allocation.

Regardless of the reason, differing approaches to web hosting eligibility among vendors have created an unlevel playing field.

Each year, Blackboard Engage carefully studies the Eligible Services List (“ESL”), compares it to its current web hosting offerings, and engages in an eligibility analysis in order to ensure that it provides an accurate eligibility percentage to its E-rate school customers. If eligibility is not clear regarding a particular feature, Blackboard Engage assumes that the feature is ineligible and either cost-allocates it or offers it to customers for a separate charge. Blackboard Engage, and Edline before it, models its web hosting offerings to closely follow the Commission’s web hosting definition, excluding and pricing separately any features that the Commission has deemed ineligible for web hosting.

Exhibit 1 is a webpage from the Blackboard Engage Edline.com website that describes to E-rate schools in detail what is eligible for E-rate funding, what is ineligible, and what can be purchased separately. Edline.com notes for its E-rate school customers that its “Learning Community Management System offers many products and services for K-12 school districts and their learning communities. However, ***only Edline’s website hosting service is eligible for federal funding discounts through the E-rate program.*** Website hosting from Edline is 95% eligible for E-rate funding (before calculation of the non-discounted portion).” Edline.com then provides lists of what E-rate will, and will not, fund for K-12 websites. Following this, Edline.com notes: “If you choose Edline as your website hosting provider,” there are products and services the school can purchase separately from Edline that can be used in conjunction with the website, “but they are not eligible for E-rate funding.” Those separate products and services are listed on the webpage (See Exhibit 1).

2. Vendors that Bundle Eligible and Ineligible Features for One Price Can Achieve Undue Competitive Advantage.

The apparent confusion about what is eligible for E-rate funding for web hosting is present in the K-12 community. Schools routinely seek broader capabilities for web hosting than those that are eligible for E-rate funding in the ESL. Exhibit 2 is a chart Blackboard Engage created to describe the categories of services that actual schools are requesting as part of web hosting for FY2014. The chart depicts how web hosting products from Blackboard Engage and four actual competitors, who shall remain anonymous, appear to match up with the schools' requests.²² As the chart makes clear, there are six features/products/services that are routinely requested by schools that are ineligible but other web hosting vendors include these features in their web hosting packages to varying degrees.

For example, schools request "Learning Management Systems" and "Content Management Systems," and other categories of features that go beyond the basic functionality of a website – including data integration to link to other school information systems; learning tools such as grading and testing systems; e-lockers for storage of individual website user files; survey and analytics packages that allow polling and statistical analyses through vendor-provided analytics tools; e-commerce modules that provide a portal or storefront on the school's website that allows for purchase of school merchandise; and a mobile application that includes mobile application software and a separate mobile website.

Based upon its study and understanding of the ESL, Blackboard Engage views these features as ineligible for E-rate funding.²³ Blackboard Engage offers these features/products/services apart

²² Blackboard Engage created the chart based upon publicly available information and believes it to be accurate. However, due to the lack of transparency surrounding eligibility determinations and cost allocations, Blackboard Engage encourages Commission to replicate the chart by obtaining the information directly from the roughly twenty companies that currently provide web hosting service.

²³ Specific clarification from the Commission would be highly useful.

from its web hosting package, charging for them separately. However, other web hosting vendors appear to provide these features as part of an eligible web hosting package. Given the lack of transparency regarding cost allocations at USAC, it is unclear if these vendors are asserting that the ineligible capabilities are eligible as “ancillary,” or if they are cost-allocating the ineligible features at USAC.

Blackboard Engage’s approach, which is more true to the definition of eligible web hosting, inevitably raises questions from schools that want more features to be included in a package rather than fewer, but want to pay for fewer features rather than more. Web hosting vendors that include ineligible features in their offering without separate pricing are unquestionably offering a more attractive product to schools that may not have a good understanding of E-rate eligibility rules.

As Exhibit 2 depicts, Blackboard Engage claims only 95% eligibility for its web hosting product when it could likely claim 100% eligibility. Blackboard Engage is unaware of any features in its web hosting offering that are unquestionably ineligible, but it claims 95% eligibility because of the “templates” it provides in its web hosting package and the uncertain interpretation of eligibility for “forms and templates.”²⁴ However, the four other vendors whose offerings are depicted on Exhibit 2, claim eligibility from 91% to 100%, while their offerings appear to include features that Blackboard Engage views as ineligible.²⁵

For example: Vendor A includes two ineligible features (survey and analytics, and a mobile application), and claims 91% eligibility. Vendor B includes five ineligible features (data integration, learning tools, e-lockers, survey and analytics, and a mobile application), and claims 94% eligibility. Vendor D includes four ineligible features (data integration, learning tools, e-lockers, and survey and

²⁴ Currently, Blackboard Engage lists “template libraries” as the sole ineligible feature in its Item 21, but it is unclear if forms and templates for applicant-created content are actually ineligible.

²⁵ Blackboard cannot assert with precision which web hosting features its competitors classify as ineligible because the Item 21 is not readily available public information. However, this information is available to the Commission from USAC.

analytics), and claims 97% eligibility. Vendor E includes three ineligible features (data integration, survey and analytics, and a mobile application), and claims 100% eligibility.

Web hosting providers have a natural incentive to seek the highest eligibility percentage that USAC will accept while including the greatest number of features. There is a competitive advantage to be gained by providers who offer the richest set of features coupled with the highest level of eligibility. As a result, virtually all web hosting providers claim an E-rate eligibility of 90% or greater today regardless of the inclusion of multiple ineligible features in their core offering.

Because many web hosting vendors are bundling ineligible features that are requested by schools together with eligible web hosting for one price, the vendors must then undertake a cost allocation process at USAC in order to subtract the cost of the ineligible components from the overall package. Blackboard Engage believes that the current cost allocation process leads to inequitable results, and questionable pricing, because there is no single method of cost allocation that is mandated under E-rate rules today, and there is no transparency and industry oversight of the pricing outcomes.²⁶ Instead, applicants and service providers are free to choose any approach as long as two requirements are met: (1) the cost allocation method has a tangible basis; and (2) the price for the eligible portion must be the most cost-effective means of receiving the eligible service.²⁷ As a result, the criteria utilized in individual cost allocations vary widely from one provider to another. Furthermore, USAC does not publish either the percentage cost allocation for individual services or the method utilized in supporting that percentage. This lack of transparency has

²⁶ However, in the case of network file servers, USAC has a strong preference for a particular cost allocation approach. *See* <http://usac.org/sl/applicants/beforeyoubegin/eligible-services/cost-allocations.aspx>. This approach could also be useful for web hosting, but has not been adopted.

²⁷ 47 C.F.R. 54.504(g)(1). The requirement for “most cost-effective” appears to be met if the applicant undertakes a proper competitive bidding process that does not include consideration of ineligible components. As to the requirement for a “tangible basis,” the USAC website goes further than the actual FCC rule by stating that the cost allocation method used also must have a “realistic result.”

precluded applicants and competing vendors from engaging in effective oversight of cost allocation practices and pricing outcomes.

For web hosting, cost allocation is further complicated because the percentage of eligibility or ineligibility attributable to each listed component of a web hosting service is highly subjective. Even if two vendors list the same components in their service, their subjective determination of individual eligibility percentages for each component can vary, resulting in widely varying eligibility formulations. This is attributable both to the fact that the services are different, and also to the level of “pushing the envelope” of individual vendors. What is more, the bases for these determinations are effectively anonymous because they are not publicly available.

3. Adopt Bright Line Rules To Increase Transparency and Decrease Subjectivity.

To avoid the subjectivity of the current web hosting cost allocations that has created an uneven playing field, Blackboard Engage suggests that the Commission adopt bright line rules to: (1) prohibit web hosting companies from bundling eligible and ineligible features for one combined price; (2) eliminate cost allocation procedures for web hosting which serve as a *de facto* and opaque pricing mechanism; and (3) abolish application of the “ancillary” rule to web hosting services (and similar services such as email).

These actions will help achieve the Commission’s goals of increasing cost-effectiveness and streamlining administration in several ways. First, web hosting providers will have clear rules regarding how eligible web hosting services must be offered and priced. Second, eliminating the opaque cost allocation process at USAC will force separate pricing for ineligible features which can then be monitored by USAC and the industry. To the extent that web hosting vendors attempt to circumvent E-rate eligibility for web hosting by offering optional, ineligible modules at a very low cost, USAC’s Free Services Advisory will clearly prohibit such subsidization. Third, by no longer allowing web hosting vendors to covertly bundle ineligible features with eligible web hosting for one

price, the Commission can ensure that E-rate dollars for web hosting services are only spent on eligible services. Finally, this recommended approach will answer the allegations of organizations that have been critical of web hosting, such as SECA, that “there are a plethora of offerings from web hosting companies that include additional, ineligible functionality” and that there is, therefore, waste with respect to web hosting services.

The result will be a more efficient ecosystem for all concerned. Schools will have better information to make informed decisions based on price. Schools also will have fewer applications rejected for including ineligible products or services. USAC will have less paperwork to process and will no longer have to review and approve cost allocations. USAC’s policing function will be improved and will be assisted by the industry because vendor pricing will be transparent. Vendors will benefit by bright line rules and a level playing field in which their competitive efforts can be properly rewarded in the market. Most importantly, the E-rate fund will benefit by ensuring that E-rate funding for web hosting is only spent on features that are truly eligible.

C. The Commission Should Encourage Bundled Purchasing and It Should Adopt Alternate Benefit Allocation Methods.

The NPRM requests comment on how consortia and other group purchasing can be leveraged by E-rate applicants for lower pricing and better value. Blackboard Engage urges the Commission to consider how E-rate applicants can individually leverage bundled purchasing and market-driven promotions to obtain a similar result.

Bundles can include both E-rate eligible services and features, and a mix of eligible and ineligible services and features. As explained above, to the extent a bundle includes both eligible and ineligible services and features, it is important that each service or feature is priced separately and transparently in order to reduce vendor subjectivity and abuse, and ensure that E-rate funding is not sought for ineligible services. No one wants scarce E-rate dollars to be spent on ineligible products and services. However, once the eligible and ineligible pricing is separated, there are benefits to

bundled purchasing and E-rate applicants and vendors should be encouraged to avail themselves of, and offer, these benefits. Indeed the argument for enabling bundled purchasing is the same as the argument for consortia purchasing: when a customer can buy more, a vendor can offer better value.

In a free and open competition, if: (1) the lowest-priced E-rate service or feature that is sought by an E-rate applicant is bundled with extra services or features that are free or discounted, whether those extras are E-rate eligible or not; and (2) the offer is generally available on a widespread basis in the open market apart from the E-rate program; and (3) the offer provides separate and transparent pricing details for each service and feature; and (4) it is clear that the pricing for the eligible service(s) sought by the applicant are the same as they would be standing alone, then that bundle should be available to the E-rate applicant, and there should be no requirement for extra accounting or cost-allocation. E-rate applicants should be able to take advantage of pricing bundles that are available in the broader market. Clearly, in this case, there is no intent to offer “free services” solely to curry favor with E-rate applicants (in violation of the rules) because the vendor offers the bundle in the marketplace to all schools and libraries apart from the E-rate program.

However, where bundled pricing for eligible and ineligible services is not available in the open market but rather is specifically targeted to offer discounted services to E-rate customers, then a mechanism for “benefit” allocation – allocation of the total savings benefit of the bundle to the E-rate applicant – should be required. In fact, if a majority of a vendor’s customers pay for services using E-rate, then perhaps additional scrutiny for that vendor’s bundled pricing should be required, because the “open market” is arguably not driving that vendor’s pricing and there could be a “free services” problem that is intended to compromise competitive bidding.²⁸

²⁸ Some vendors receive as much as 75% of their revenue from E-rate. A majority of Blackboard Engage’s revenue comes from non-E-rate customers.

Blackboard Engage suggests that the best way to encourage vendors to offer the most value to E-rate applicants, when offers are made solely to E-rate applicants, is to provide some flexibility in how the benefit allocation is computed. Specifically, vendors should have the option to compute the allocation based on: (a) the *total dollar value* of the “benefit” allocated proportionately against each service and feature in the bundle based on the otherwise applicable retail price for each; or (b) offering the *same percentage discount* to all services and features in the bundle as a percentage of the otherwise applicable retail price for each. From our perspective, requiring the proportional allocation of the total dollar value is a disincentive to bundle because the calculation almost necessarily is a manual process and difficult for accounting systems to administer. We believe offering some degree of flexibility in this regard will result in better value for E-rate applicants and more options in the market from vendors. At a time when we need E-rate dollars to stretch further, USAC and the FCC should take measures to make it easier for applicants and service providers to provide value to schools without violating rules.

Some measure of scrutiny also is required where E-rate applicants try to specifically require bundling of E-rate services. For example, Blackboard Engage recently became aware of schools including a requirement in their Form 470s that vendors must offer web hosting and Internet access and/or email in order to provide a bid. In some instances it seems clear that these requirements are tailored to a specific vendor. In order to ensure that the school is getting the benefit of the lowest prices possible for each service or product requested, we assume that USAC and the FCC support all vendors responding to these requests so that both individual and bundled pricing can be considered by the applicant. Under program rules, applicants must choose the “most cost-effective” bid.²⁹ Applicants may consider other factors, “but the price of the E-rate eligible products and

²⁹ See 47 C.F.R. 54.511.

services . . . must be weighted more heavily than any other single factor.”³⁰ Accordingly, an E-rate applicant’s refusal, when issuing its Form 470, to consider pricing for individual services which could result in the lowest cost for each service, appears to be a rule violation. USAC’s or the Commission’s attention to this practice would be helpful.

Some schools also are requiring a physical on-site presentation by vendors, a requirement that is clearly intended to favor regional vendors. A physical presentation requirement may make sense for E-rate services that involve physical infrastructure, but they serve no rational basis for SaaS web hosting. A web hosting vendor can make a presentation regarding its service in real time via video conference from literally anywhere today. Requiring physical presentations for SaaS services can, in some cases, increase the vendors’ cost beyond the actual service pricing. It simply makes no sense. Nonetheless, it appears USAC has permitted this requirement, seemingly de-emphasizing the Commission’s emphasis on the lowest cost service. Applicants should be prohibited from placing these kinds of conditions on their requests for services which could prevent lower-cost vendors from bidding for their services.

D. The Commission Should Permit E-Rate Participants To Receive Any Free Goods That Are Generally Available in the Marketplace To Non-E-Rate Customers.

The current gifting and free-services restrictions essentially function to prohibit an E-rate customer from receiving any free good, service or other promotion even if the good or service in question is offered by the vendor to non-E-rate customers in the normal course of business. Earlier this year, the Commission proposed to clarify that applicants may seek E-rate funding for the eligible services portion of any bundled offering, but must provide a cost allocation for any ineligible components including, but not limited to, telephone handsets, computers, cell phones, and other

³⁰ See USAC website, “Selecting Service Providers,” available at <http://www.usac.org/sl/applicants/step03/>.

components.³¹ Under the proposal, cost allocation would be required even if the same bundle is offered to the public in the open market. While the Commission justifies this proposed bright line approach as a way to avoid an unintended expansion of the cost allocation exemption, the result of such a framework prevents E-rate schools from benefitting from special promotions that non-E-rate schools and other customers can receive. Again, offers that are generally available in the marketplace clearly are not engineered to curry favor with E-rate applicants, and thus should not be a violation of the “free services” advisory. Prohibiting E-rate schools and libraries from receiving free goods and services a vendor offers to non-E-rate customers in the normal course, or in connection with a promotion, is a bizarre result that runs counter to the Commission’s stated goal of cost-effectiveness, and should be revisited.

To be clear, Blackboard Engage understands the concern that, in some cases, free products can open the door to nefarious conduct that could compromise the competitive bidding process, and we are mindful of the Commission’s duty to protect against waste, fraud and abuse. However, with respect to free services, we believe that adopting simple rules can address those concerns: (1) as noted above, require that eligible and ineligible products are priced separately; (2) require that a free product or service must actually be free (i.e., the resulting customer price for an E-rate service or feature cannot increase solely because other products or services are included); (3) require that the evaluation of the most cost-effective eligible product or service cannot take into consideration the value or benefit of any included free product or service; and (4) require that the free product or service must be offered for free by the vendor on a widespread basis to non-E-rate customers.

E. The Commission Should Establish a Voluntary Pre-Certification Program for Vendor Product Eligibility.

³¹ See *Wireline Competition Bureau Seeks Comment on the Eligibility of Bundled Components Under the Schools and Libraries Program*, CC Docket No. 02-6, GN Docket No. 09-51, Public Notice, DA 13-592, ¶ 7 (rel. April 9, 2013) (“Public Notice”).

Blackboard Engage recommends that the Commission consider developing a voluntary certification process by which USAC, or an outsourced vendor, would pre-certify eligibility for an E-rate vendor's products or services according to guidelines set by USAC and the FCC in accordance with the ESL. At present, every funding request must undergo review to determine eligibility.

Current USAC review is simply too subjective. A reviewer may be new or unfamiliar with the product or the vendor's eligibility. In some cases, the reviewer doesn't even review the vendor's cost-allocation filing with USAC before rendering an eligibility determination.

A pre-certification approach that provides certainty as to what will and will not be funded would vastly simplify the process while remaining consistent with the objectives of the program. Those vendors that undertake pre-certification, and their E-rate customers, would have the confidence and certainty that the E-rate products and services are eligible for support as represented. For these vendors, USAC staff would not have to police eligibility issues on an ad hoc basis, and the vendors and applicants would not be subject to unnecessary USAC review processes, or inconsistent USAC judgments about eligibility. E-rate vendors wishing to obtain pre-certification of eligibility would pay for the costs of the certification up-front. Smaller vendors, for whom a certification fee may be burdensome, could decline to participate in this process with the understanding that USAC or the FCC will review eligibility later and, if questions arise, those questions or reviews could hold up progress on their E-rate contracts in the future.

Other federal agencies have successfully adopted pre-authorization programs. For example, the FedRAMP program (the federal government's cloud computing initiative) establishes a "provisional authorization" framework.³² The FedRAMP program provides a streamlined avenue for federal agencies to make use of cloud service providers after undergoing a security assessment by a Third-Party Assessment Organization ("3PAO"). The Provisional Authorization allows federal

³² See *Guide to Understanding FedRAMP*, Version 1.2 (April 22, 2013).

agencies to forego the security assessment process for a multitude of known security controls. The independent assessment is paid for by the cloud service provider and must be performed in accordance with FedRAMP assessment procedures by an accredited 3PAO (organizations apply to become an accredited 3PAO). In order to ensure that all cloud service provider systems are being assessed equally and according to the same security baseline controls, templates have been developed in FedRAMP to standardize the assessment process. According to the US General Services Administration, “FedRAMP is a standardized approach to cloud security assessments, authorization, and monitoring that will save the government money, time, and staff by eliminating redundant agency security assessments.”

A similar E-rate pre-certification process could achieve the same goals of saving time and financial resources.³³

F. The Commission Should Make USAC’s Feature Eligibility Determinations Publicly Available.

Although USAC is not charged with making policy determinations, it is responsible for reviewing vendor products and services to determine whether those products or services are eligible and consistent with the Eligible Services List and Commission policies. USAC necessarily makes de facto feature eligibility determinations today,³⁴ but such eligibility determinations are subjective, vendor specific, and not transparent or available to the public.³⁵

³³ Potentially, a group of accredited reviewers could make eligibility authorizations, which could save USAC tremendous resources and also provide an avenue for how this type of proposal could actually be workable in light of USAC’s small staff. Like FedRAMP, templates and other clear eligibility guidelines should be developed in order to make the eligibility determinations as standardized as possible.

³⁴ USAC’s specific eligibility conclusions are an implementation of FCC policy and do not constitute inappropriate “policy making.” Such determinations must be made by USAC to fulfill its administrative responsibility.

³⁵ See *supra* at 9 (discussing USAC’s Form 474 review and describing how USAC objected to our contractual language this year without clear explanation even though the same language was accepted in prior years).

Today, if a vendor offers any feature for which the eligibility is unclear, the vendor's only options are to: (a) make a best guess, await a USAC reviewer's assessment, and then begin the appeals process through to the Commission (if eligibility is denied); (b) request a meeting with a USAC representative and (if granted) travel to Washington, D.C. to review the details of a product, service, or network architecture in order to assess whether the detailed specifications are consistent with eligibility rules; or (c) wait for the annual ESL commenting period and argue for specific inclusion in the ESL.³⁶ All options are expensive, time consuming, and inefficient for the vendor, the customer, and USAC.

We understand that USAC maintains an internal database that provides eligibility information to its reviewers. The problem, however, is that these case-by-case determinations are not transparent or communicated to the broader E-rate community. If reviewers are advised that a specific service feature, or product make and model number, is eligible, then all stakeholders, including applicants and service providers, should have access to this information.

A more reasonable, efficient, less expensive approach, coupled with the prior suggestion for pre-certification, is for USAC to provide the details for how it is administering FCC policy *vis a vis* specific products and services on its public website. With public posting of eligibility decisions, vendors and applicants will have clear, consistent guidance on gray area eligibility questions, reducing USAC reviewer rejections and decreasing the number of appeals.³⁷ The broad dissemination of this information also furthers the Commission's valuable transparency initiative. The result would be a much easier, cheaper, faster and fairer process for all concerned.

³⁶ With respect to the ESL process, even though a vendor may ask for clarification of eligibility in the ESL, the Commission is under no obligation to provide it (and often doesn't).

³⁷ We believe that the value of clear, consistent, transparent eligibility guidance available to all vendors and applicants far outweighs the costs associated with the potential risk of USAC making an incorrect eligibility determination in respect of any given feature.

G. The Commission Should Tie Release and Use of the of the Form 470 for a Funding Year with Release of the Finalized ESL for that Year To Eliminate Uncertainty and Mitigate Against Vendors Gaming the System.

Currently, the FCC Form 470 for an upcoming funding year is available on the USAC website one year before the start of the funding year, i.e. on or about July 1st. Once the FCC Form 470 is available online, it can be filed and posted by applicants to request services for the upcoming funding year. However, the Commission does not release a final ESL confirming which products and services will be E-rate eligible for the upcoming funding year until late September.³⁸ The disconnect in timing between the option for applicants to post a Form 470 to request services, and the Commission's annual release of the ESL, negatively impacts the E-rate program for two reasons. The first is seemingly obvious: eligibility should be unambiguous before applicants solicit proposals and enter into agreements. Put simply, the rules should be clear before the race starts.

But the second concern is more important – “poison pill” contracting. The timing lapse in the present approach increases the opportunity for vendors to be aware of potential new applicants for E-rate funding outside of the E-rate program and then essentially lock out other competition through inclusion of termination penalties and other “poison pill” contractual provisions that make choosing that same vendor in the competitive bidding process highly preferable. Such coercive tactics violate the competitive bidding rules by impeding an open and fair process and unfairly influencing competitive outcomes.³⁹

In order to reduce the large window of opportunity that currently exists for unscrupulous vendors to game the system, and to avoid the waste that can occur from applicants posting Form 470s in the absence of complete eligibility information, the Commission should normalize the date on which the finalized ESL for an upcoming funding year is released with the date upon which the

³⁸ For Funding Year 2013, the ESL was released on September 27, 2012. For Funding Year 2012, the ESL was released on September 28, 2011.

³⁹ *See* 47 C.F.R. § 54.503.

Form 470 related to the same upcoming funding year is released and available for posting by applicants. Requiring applicants to wait until the ESL is finalized for a funding year before posting a Form 470, usually in late September (as opposed to July 1), still provides sufficient time to conduct a full and robust competitive bidding process while giving schools the benefit of developing the Form 470 with complete eligibility information for the relevant funding year.

In addition, the Commission should require all E-rate service providers to agree that early termination penalties or cost accelerations in contracts entered into outside of E-rate are unenforceable against E-rate applicants. Accordingly, an applicant should not be permitted to consider early termination penalties or other similar provisions in an existing contract in its “most cost-effective” analysis of service provider proposals.

H. The Commission Should Clarify the Lowest Corresponding Price Rule To Eliminate Existing Widespread Confusion.

In the NPRM, the Commission seeks comment “on whether it is necessary to clarify the scope and meaning of the lowest corresponding price (“LCP”) rule.”⁴⁰ In Blackboard’s view, it is critical for the Commission to provide clarifications to the LCP requirement which, as it currently stands, is widely misunderstood and the source of much confusion in the E-rate community.

Although the LCP rule as originally conceived was a well-intentioned effort to protect E-rate applicants and ensure they are not charged more than their non-E-rate counterparts for the same services, the E-rate marketplace has changed significantly since the LCP rule was adopted. As a result, there are now several aspects of the LCP rule which need to be clarified so that this obligation is consistently understood and applied.

Earlier in 2013, the Wireless Competition Bureau proposed to require service providers to certify on the Form 473, the Service Provider Annual Certification Form, their compliance with the

⁴⁰ See NPRM, ¶ 210.

LCP rule.⁴¹ As the comments and reply comments in that proceeding forcefully demonstrated, due to the substantial confusion and uncertainty surrounding application of the LCP rule, service providers today are forced to rely on good faith efforts to comply with the rule based on USAC's limited guidance and their own interpretation of what the LCP rule requires.⁴² Under these ambiguous conditions, service providers do not have the necessary knowledge to make an LCP certification, nor can they be certain their interpretation of the LCP obligation is the correct one.

As a result, due to the persistent ambiguity surrounding the LCP rule, to the extent the Commission makes any clarifications involving LCP, those clarifications should only be applied prospectively. Service providers should not be penalized for failing to know the unknowable.

In terms of specific clarifications, as a threshold matter, the Commission should clarify which service providers are actually covered by the LCP rule. Although the Commission's rules broadly define LCP as "the lowest price that a service provider charges to non-residential customers who are similarly situated to a particular school, library, or library consortium for similar services,"⁴³ Commission orders indicate that the rule applies to "telecommunications carriers" or "common carriers" that participate in the E-rate program, not providers of Internet access and internal connections.⁴⁴ If the Commission intends to expand the scope of the LCP rule beyond rate regulated entities, it must articulate a specific proposal subject to notice and comment rulemaking under the APA.

⁴¹ See *Wireline Competition Bureau Seeks Comment on Revisions to FCC Forms 472, 473, and 474*, Public Notice, 28 FCC Rcd 2210 (March 8, 2013).

⁴² For example, USAC has in the past provided guidance stating that any special promotion offered for over 90 days by a vendor must be factored into the LCP determination.

⁴³ 47 C.F.R. § 54.500(f).

⁴⁴ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157, 12 FCC Rcd 8776, ¶ 484 (1997) ("Universal Service Order") (subsequent history omitted); see also *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Declaratory Ruling, FCC 99-10, 14 FCC Rcd 3040, ¶ 8, n. 18 (1999).

In addition, the Commission should clarify what is meant by the lowest “corresponding” price. Assuming this refers to the lowest price offered to any “similarly situated” customers, the Commission should define what is meant by “similarly situated.” Moreover, the Commission should confirm that even among similarly situated customers, pricing can legitimately vary “to reflect any factors that clearly and significantly affect the cost of service . . .” to a particular school or library.⁴⁵

Clarification is also needed regarding how normal product price increases fit within the current LCP framework. Given the current language, it is arguable today that the LCP rule could prohibit price increases forever. Clearly, this cannot be the intended result, but specific clarification is vital. If reasonable price increases are allowed upon express consent of the Commission (as current rules may indicate), then the Commission must clarify how this can be done (e.g. currently there is no form or process for handling requests for reasonable price increases from thousands of E-rate service providers).

Finally, Blackboard urges the Commission to move forward and complete action on the clarifications requested by USTelecom and CTIA – The Wireless Association (“CTIA”) in their pending Petition for Declaratory Ruling filed in 2010.⁴⁶ That Petition identified at least six clarifications that are needed with the respect to the LCP rule:

- Clarify that the LCP obligation applies only to competitive bids submitted by a service provider in response to a Form 470;
- Clarify that the LCP obligation is not a continuing obligation that entitles schools to continuously assert a right to lower pricing during the term of a contract;

⁴⁵ See *Universal Service Order* at ¶ 488.

⁴⁶ See Petition of United States Telecom Association and CTIA-The Wireless Association® for Declaratory Ruling Clarifying Certain Aspects of the “Lowest Corresponding Price” Obligation of the Schools and Libraries Universal Service Program, *Schools and Libraries Universal Service Support Mechanism*, CC Dkt. No. 02-6 (filed March 19, 2010).

- Clarify that there are no specific procedures that a service provider must use to ensure compliance with the LCP obligation;
- Clarify that, in determining whether a service bundle complies with the LCP obligation, discrete elements in the bundle need not be individually compared and priced;
- Clarify that if a service provider's bid is challenged for an alleged failure to satisfy the LCP obligation, the initial burden falls on the challenger (i.e., a school or library) to demonstrate a prima facie case that the bid did not satisfy the LCP; and
- Clarify that Commission or Bureau interpretations of the LCP requirements will be applied prospectively only.

Meaningful clarification on all of these points, as well as those identified above by Blackboard, are desperately needed to provide a consistent, clear understanding of the LCP obligations of service providers.

I. When It Comes To Forms: Less Is More; Electronic Filing Is Beneficial; and Digital Signatures Should Be Encouraged.

The Commission seeks comment on whether steps can be taken to reduce the amount of forms and supporting paperwork currently in use in the E-rate process. Blackboard Engage fully supports any proposals to reduce paperwork.

Specifically in respect of the Form 474 (SPI) paperwork process, Blackboard Engage believes the process would be more efficient if service providers could upload required documentation when they electronically file the Form 474. Today, in response to the submission of a Form 474 (SPI), USAC reviewers often request a copy of both the service provider invoice and contract to support the applicable charges. Permitting the submission of the supporting documents with the Form 474 would reduce this extra step and speed up the review process.⁴⁷

In addition, USAC and the Commission should permit the use of electronic signatures for every E-rate requirement possible. For example, E-rate forms can generally be signed electronically,

⁴⁷ Even though enabling broader electronic filing may require USAC to upgrade its internal technology systems, we believe that the administrative and economic benefits outweigh any initial upfront costs.

but E-rate contracts require original signatures. Affidavits in response to a Form 470 RFP also may require original signatures, but it is not clear. If a service provider and school use SIGNiX or DocuSign to execute E-rate contracts, for example, then this method of electronic authentication should meet the requirements of the program, without the requirement to submit “wet” signatures. Permitting the use of electronic signatures would improve the efficiency of service providers and applicants in the program, and simplify the Commission’s regulatory requirements in conformance with the Electronic Signatures in Global and National Commerce Act.⁴⁸ While USAC recently stated during a monthly service provider call that electronic signatures on E-rate contracts are valid if they would be considered valid under the relevant state’s contract law,⁴⁹ more formal direction from the Commission is necessary to resolve any doubt.

J. Changes to Invoicing and Disbursement Should be Considered.

Blackboard Engage also suggests that the Commission consider abolishing the process of remitting Form 472 (BEAR) funds to applicants through service providers. We feel that requiring that the funds first go to the applicable service provider, for the service provider to in turn pay the applicant, is inefficient and appears to offer little additional oversight.

Today, before filing a Form 472, applicants must obtain a signature from their service provider certifying that the applicant has paid the service provider in full. Moreover, the applicant’s funding request has already passed a PIA review and the applicant has certified that it has received the service via the Form 486 (Receipt of Service Confirmation Form). Remitting the Form 472 funds directly to applicants would make it easier for applicants to track their Form 472 payments by removing the service providers and the service providers’ accounts payable departments from the process.

⁴⁸ Pub. L. No. 106-229, 114 Stat. 464 (2000)(codified at 15 U.S.C. § 7001 *et seq.*).

⁴⁹ See Minutes from Schools and Libraries Service Provider Conference Call (June 5, 2013), *available at* http://www.usac.org/_res/documents/sl/pdf/conference-calls/2013/06-2013-SL.pdf.

K. Multi-Year Agreements Should Be Encouraged by Requiring Less Paperwork.

Blackboard Engage supports the Commission’s proposal to allow E-rate applicants with multi-year contracts that are no more than three years in length (including any voluntary extensions) to file a single FCC Form 471 application for the funding year in which the contract commences and go through the full review process just once for each multi-year contract.⁵⁰ We recognize that the market for telecommunication and Internet services can change from year to year and believe that a three year limit on the multi-year term is reasonable. Blackboard Engage also believes that in order to comply with many state and local procurement laws, and to help ensure that schools can capitalize on any favorable market shifts, all contracts should include an annual opt-out clause for applicants tied to the end of the applicable E-Rate funding year. Furthermore, the filing of a Form 470 funding request for identical services should serve as a cancellation notice with respect to any prior contracts for that service under the program. Similarly, in contract years two and three in which there exists no service provider cancellation option or in which the service provider has opted not to cancel, the filing of a Form 471 Funding Request for the service in the absence of a new Form 470 filing should be considered sufficient to demonstrate the applicant’s intent is to continue the contract.

L. The Commission Should Not Increase Reporting Requirements.

The NPRM also asks for comment on whether additional reporting requirements would be beneficial to the E-rate program. Getting additional data is a compelling goal. However, Blackboard Engage urges the Commission to remain mindful of its stated overarching goals: increasing cost-effectiveness and streamlining administration. On its face more data is “good.” However, imposing data collection and reporting requirements could add additional costs and

⁵⁰See NPRM, ¶ 241.

obligations on already under-resourced schools and vendors (and USAC) who often struggle to comply with the rules and requirements already in place. Instead of more reporting requirements, we request careful consideration of our transparency arguments above. Full public transparency of the E-rate process, with all related documents available on a public website, will go a long way toward accomplishing some of the goals attributed to additional reporting requirements.

M. The Document Retention Requirement Should Not Be Extended To Ten Years.

Perhaps the most flummoxing suggestion in the NPRM is that the document retention requirement should be extended from five years to ten. We are unable to ascertain any benefit from doubling the document retention requirement that would outweigh the burden imposed on schools, libraries, and vendors.

For many vendors and schools alike, ten years is an eternity with respect to institutional memory. Staff changes and turnover create a high probability that the individuals involved in, or familiar with, a given document are simply not available after five years. Any review of documentation would, therefore, be based solely on the four corners of the document being reviewed without any additional context or background – even though the facts and circumstances surrounding any given transaction may be critical to understanding the underlying documentation. Further, there is utility in finality. Schools, libraries, and vendors need certainty with respect to their purchases, budgets, and revenue after a reasonable period of time.

In the E-rate Fifth Report and Order, the Commission announced its policy that USAC and the Commission must initiate and complete any audits or investigations to determine whether or not statutory or rule violations exist within a **five year period** after final delivery of service for a specific funding year.⁵¹ When choosing this timeframe, the Commission explicitly stated the limitation

⁵¹ *Schools and Libraries Universal Service Support Mechanism*, CC Docket No. 02-6, Fifth Report and Order, 19 FCC Rcd 15808, ¶¶ 32-34 (2004).

period should match the record retention requirements for “administrative efficiency,” and that “conducting inquiries within five years strikes an appropriate balance between preserving the Commission’s fiduciary duty to protect the fund against waste, fraud and abuse and the beneficiaries’ need for certainty and closure in their E-rate application processes.”

We agree with the Commission’s 2004 conclusion. Schools, libraries and vendors have enough paperwork to manage. Doubling the retention requirement turns a blind eye to administrative efficiency and the need for certainty and closure in their E-rate application and funding process. We urge the Commission to reject doubling the document retention requirement.

III. IN THE EVENT THAT E-RATE FUNDING FOR WEB HOSTING IS ELIMINATED, FUNDING SHOULD COMPLETELY CEASE IN 2015.

As we stated above, E-rate eligible web hosting services provide an essential means for students, teachers, parents and administrators to share important information, as a community, about the entire educational experience, including the school, the classroom, school events, student performance and school initiatives in a manner that improves educational outcomes. However, if the Commission interprets President Obama’s ConnectEd initiative to require that E-rate funds be focused solely on high-capacity broadband access to the detriment of web hosting, E-rate funding of web hosting should cease entirely in 2015 rather than be phased out gradually.

Current bundling restrictions on eligible and ineligible products, coupled with the present gifting restrictions and prohibitions on providing free services, stymie market efficiencies that otherwise may create additional value for schools. If the Commission elects to eliminate the E-rate subsidy for web hosting, it is likely to do so while rejecting the reform proposals set forth herein. If the Commission sunsets E-rate funding over multiple years, it will create the worst possible result for schools and libraries: decreasing the schools’ and libraries’ ability to purchase web hosting while continuing to restrict providers’ ability to bundle, offer creative pricing options across products, and offer free services to maximize value.

A better result is to set a clear termination date of 2015. Presumably the Commission would announce its decision in 2014, giving schools, libraries, and vendors time to make plans accordingly. Blackboard Engage and other vendors would then have a year to work with customers to develop creative solutions to the funding loss through product bundling and shared sacrifice, and alternative product offerings that take into account the schools' and libraries' reduced ability to pay. Reduced funding over a series of years, coupled with the shackles of the current bundling restrictions and prohibitions on gifting and free services, would severely impede the creative development of product solutions to meet the schools' and libraries' needs while adjusting for their overall financial constraints.

IV. CONCLUSION.

For years, Blackboard Engage had defended eligibility for, and funding for, web hosting services. In view of the benefits of web hosting and the marginal costs to the E-rate program, Blackboard Engage and many other stakeholders have asserted that E-rate eligibility for web hosting should be kept.

However, if the Commission determines that it must eliminate funding for web hosting in order to maximize funding for robust broadband connections to our K-12 schools, then Blackboard Engage proposes that the Commission should discontinue funding in 2015 (or the funding year that is one year after such a decision is made), and not engage in a gradual phase-out of eligibility. A gradual phase-out would create the worst possible result for schools and service providers – decreasing the schools' and libraries' ability to purchase web hosting while continuing to restrict providers' ability to offer creative pricing options across products, and offer free services to maximize value.

If eligibility for web hosting is not eliminated as a result of this proceeding, then Blackboard Engage urges the Commission to make several improvements to the program as described herein.

These changes should improve the cost-effectiveness of the program, improve transparency, and improve administration of the program. Not all of the suggestions made by Blackboard Engage in these comments are in our financial best interest. However, Blackboard Engage takes its role as a corporate partner to K-12 schools seriously, and hopes for results in this proceeding that are positive for all stakeholders who value web hosting for today's school communities.

Respectfully submitted,

_____/s/____

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September 16, 2013

Exhibit 1

Edline's Guidance to E-rate School Customers regarding Web Hosting Eligibility

"Website Hosting and the Federal E-rate Program"

E-rate

Website Hosting and the Federal E-rate Program

Edline's Learning Community Management System offers many products and services for K-12 school districts and their learning communities. However, only Edline's website hosting service is eligible for federal funding discounts through the E-rate program. Website hosting from Edline is 95% eligible for E-rate funding (before calculation of the non-discounted portion). The following provides highlights of what E-rate will, and will not, fund for K-12 websites.

Overall, the E-rate program funds and provide discounts for K-12 school websites and library websites, including:

- Website administration tools to create and maintain your website
- Interactive communication features on your website such as blogs, discussion boards
- Webmail
- Features on your website that facilitate real-time interactive communications
- Instant messaging and chat

Please note that not all content, services, systems and features that can be used with a website are eligible for E-rate funding. For example, the following are ineligible:

- Costs for content created by third-party vendors
- Costs for vendor design services
- Charges for distance learning or video conferencing utilities such as web meetings
- Charges for student information systems, grade management systems, and similar products

If you choose Edline as your website hosting provider, the following products and services from Edline can be purchased separately and used in conjunction with your website, but they are not eligible for E-rate funding:

- QuickStart Custom Graphic Design Services
- Interactive Classroom (quiz tools, interactive assignments, etc.)
- Notification Systems (phone/SMS/text) for sending emergency and other communications
- Edline's Award-Winning Gradebooks
- Forms & Surveys
- LiveLink

This brief overview of federal E-rate funding for website hosting is not comprehensive. The lists above of eligible and ineligible website hosting services, products and features are by no means exhaustive. Schools and school districts choosing to apply for E-rate funding for website hosting must select a service provider after conducting a fair and open competitive bidding process, in compliance with state and local procurement guidelines and federal regulations. For a complete description of eligible and ineligible website hosting services, and to learn more about the E-rate program, the application process, and the rules and regulations, please visit www.USAC.org/sl.

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Exhibit 2

Comparison of Web Hosting Offerings and Eligibility Approaches Among Five Vendors

4834-0558-0820.

Web Hosting Feature List	Vendor A	Vendor B	Vendor C (Edline)	Vendor D	Vendor E	E-rate Eligible?
Website Administration Tools to Create and Maintain a website						
Basic Website Hosting and Guaranteed Uptime	√	√	√	√	√	Yes
Site Navigation and Search	√	√	√	√	√	Yes
Permissions and Approvals: Permissions for website access and posting content.	√	√	√	√	√	Yes
File Storage: Central file storage area for the school's content on the website.	√	√	√	√	√	Yes
Pre-configured Class and Teacher Pages	√	√	√	√	√	Yes
News and Announcements: Ability to post news and announcements to the website	√	√	√	√	√	Yes
Calendars	√	√	√	√	√	ancillary
User Logins (including Single Sign On)	√	√	√	√	√	Yes
Webmail: Permits sending of webmail to users on the website.	√	√	√	√	√	Yes
Photo Galleries: Allows images taken by the school to be posted, stored and viewed by website users.	√	√	√	√	√	Yes
Interactive communication features: Blogs, instant messaging and chat.	√	√	√	√	√	Yes
RSS Subscriptions: Allows users to receive content feeds from the Internet.	√	√	√	√	√	Yes
Parent Portal: Allows parents to access the website.	√	√	√	√	√	Yes
Mobile Access: Browser optimization to allow users to access the school website on mobile platforms.	√	√	√	√	√	Yes
Forms and templates (form builders): Allows schools to create fill-in-the blank and administrative forms for the website using templates.	√	√	√	√	√	?
Other Features and Modules that are Requested from Web Hosting Vendors						
Data Integration: Ability to link to other systems for information import/export, including learning management systems.				√	√	No
Learning Tools: grade management systems, tests or testing systems, homework hand-in and correction, collaborative tools, etc.	Unclear	√		√		No
eLockers: Storage for individual user files	Unclear	√				No
Surveys and Analytics: Software that allows polling, data input and retrieval, and performs statistical analysis with vendor-provided analytics tools	√	√		√	√	No
e-Commerce: Module that provides a portal storefront on the school's website that allows purchase of, and payment for, school merchandise.		√		√		No
Mobile Application: Mobile application software.	√	√		√	√	No
E-Rate Eligibility	91%	94%	95%	97%	100%	
# of Ineligible Features	2	5		5	3	

CERTIFICATE OF SERVICE

I, Maria C. Wolvin, certify on this 16th day of September 2013, a copy of the foregoing Comments has been served via electronic mail or first class mail, postage pre-paid, to the following:

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